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Cumis Ins. Society, Inc v. Massey Respondent's Brief Dckt. 40002

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 40002-2012

CUMIS INSURANCE SOCIETY, INC.,

Plaintiff-Appellant,

vs.

WADE MASSEY and CAPITOL WEST APPRAISALS,

Defendants-Respondents.

RESPONDENTS' BRIEF

Appeal from the District Court for the Third Judicial Circuit for Canyon County
Honorable Juneal C. Kerrick Presiding
Case No. 2010-3993

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal arises out of the District Court's grant of summary judgment in favor of Defendants Wade Massey and Capitol West Appraisals (hereinafter respectively "Massey" and "Capitol West," and collectively the "Massey Defendants").

The Massey Defendants contend that: (1) the District Court correctly ruled that the Defendants did not owe the Plaintiff a tort duty upon which to predicate its professional negligence cause of action; (2) the District Court did not rely on evidence not in the record; and (3) there were no genuine issues of material fact so as to preclude judgment as a matter of law in favor of the Massey Defendants. The Massey Defendants therefore respectfully urge the Supreme Court to affirm the District Court's judgment.

B. COURSE OF PROCEEDINGS BELOW

The Plaintiff commenced this lawsuit on April 12, 2010, in the Third Judicial District of the State of Idaho, County of Canyon. R Vol. I, p. 6-11. The Complaint alleged professional negligence, negligent misrepresentation and breach of contract. R Vol. I, p. 6-11. Thereafter, the parties engaged in written discovery and on May 17, 2011, deposed Massey and Plaintiff's Idaho Rule of Civil Procedure 30(b)(6) designee, Connie Miller.[1]

The Massey Defendants moved for summary judgment on November 10, 2011. R Vol. I, p. 17-180. The Plaintiff, in turn, moved for summary judgment on November 15, 2011. R Vol.

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1 As of May 17, 2011, Connie Miller was President/CEO of Icon Federal Credit Union, which subrogated its claims to Plaintiff. The Plaintiff, therefore, "stands in the shoes" of Icon, f/n/a "Idahy".

I, p. 129-130. The District Court heard oral argument on the motions for summary judgment on February 9, 2012. R Vol. II, p. 194-205. At that hearing, the District Court advised counsel for the Massey Defendants that it did not have a copy of the Affidavit of Ernie Menchaca, which the Massey Defendants had referenced over a dozen times in their supporting memorandum. R Vol. II, p. 194-205; R Vol. I, p. 113-128; Tr., February 9, 2012 hearing, p. 5-8. Counsel for the Plaintiff stated that he "believe[d]" he had a copy of the Menchaca Affidavit and stipulated to admitting into the record. Tr., February 9, 2012 hearing, p. 5-6.

In its Order on Motions for Summary Judgment dated February 17, 2012, the District Court granted summary judgment in favor of the Massey Defendants, dismissing the Plaintiff's causes of action. R Vol. II, p. 194-205. Accordingly, the District Court stated that it did not need to reach Plaintiff's Motion for Summary Judgment.[2] R Vol. II, p. 204.

On March 1, 2012, the Plaintiff filed a Motion for Reconsideration of the District Court's Orders on Motions for Summary Judgment, arguing that material issues of fact precluded summary judgment. R Vol. II, p. 206-216. The District Court signed a Judgment dismissing the Plaintiff's claims with prejudice on March 15, 2012, and on March 22, 2012, the Massey Defendants filed a Motion for Costs and Attorneys' Fees. R Vol. II, p. 217-219. In its Order dated April 10, 2012, the District Court denied the Plaintiff's Motion for Reconsideration. R vol.

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2 Without citing to the record, the Plaintiff asserts on page 20 of its brief that the District Court did not "read" the Plaintiff's summary judgment papers. Counsel for the Massey Defendants cannot locate in the record where the District Court ever stated not "reading" the Plaintiff's moving papers. The District Court, however, did rule in its Order granting summary judgment in favor the Massey Defendants that it did not to "need reach" the Plaintiff's motion for summary judgment. The fact that the Plaintiff's motion for summary judgment was rendered moot by the District Court's ruling is not equivalent to not "reading" the Plaintiff's motion for summary judgment.

II, p. 260-269. On April 19, 2012, the Plaintiff filed a Motion to Permit the Taking of Ernie Menchaca Deposition Pursuant to Rule 56(f) and Renewed Motion to Reconsider the Court's Order Granting Summary Judgment (hereinafter the "Renewed Motion to Reconsider"). R Vol. II, p. 270-275. In support of the Renewed Motion to Reconsider, the Plaintiff also filed the Affidavits of Patrick J. Collins and Jeffrey M. Wilson, which attested that neither had a copy of the Affidavit of Ernie Menchaca that attorney Wilson previously had stipulated to the admission of into the record. R Vol. II, p. 276-285.After hearing from the parties on May 10, 2012, the District Court denied the Plaintiff's Renewed Motion. Tr., May 10, 2012 hearing, p. 30-31. It also awarded Defendants Massey costs, but declined to award attorneys' fees. A Supplemental Judgment was filed on June 21, 2012, and this appeal followed.

C. STATEMENT OF FACTS

On or about June 13, 2007, Defendant Wade Massey ("Massey") performed an appraisal of the real property located at 16462 Plum Drive, Caldwell, Idaho 83607 for Clearwater Mortgage Inc. (the "Appraisal"). R Vol. I, p. 115. The Appraisal report identified Clearwater Mortgage as the "intended user," and Massey initially prepared it exclusively for that company to aid in its decision whether to extend Steven and Valerie Hruza ("Hruza") a loan. R Vol. I, p. 115. Massey never thought that Idahy Federal Credit Union ("Idahy"), which now is known as Icon Federal Credit Union ("Icon"), was his client. R Vol. I, p. 115. In fact, Massey never communicated with anyone at Idahy about anything, including the appraisal. R Vol. I, p. 115. Nor did Massey know that Idahy had obtained a copy of the Appraisal until he was served the Complaint. R Vol. I, p. 115.

Massey emailed the draft copy of the Appraisal report to Clearwater Mortgage. R. Vol. I, p. 115. Because the report was in preliminary draft form, Clearwater Mortgage did not rely upon it in its decision whether to loan Hruza money. R Vol. I, p. 115.. Clearwater Mortgage declined Hruza's loan application for reasons independent of the Appraisal. R Vol. I, p 116. Because Clearwater Mortgage declined Hruza's loan application, the President of Clearwater Mortgage, Ernie Menchaca and Massey decided that, in lieu of revising and completing the Appraisal, the Massey Defendants would forego any payment for the services provided. R Vol. I, p. 116.

In or about September 2007, Idahy extended a loan to Hruza, which was secured by a second position security interest on their personal residence. R Vol. I, p. 116. Idahy claims to have relied on the Appraisal report, which stated that the value of Hruza's property was $1,150,000, but Idahy does not know how it obtained a copy of the Appraisal. R Vol. I, p. 116. Idahy never requested a letter of assignment from Clearwater Mortgage, Inc. to use or rely on the Appraisal, which is customary in the industry. R Vol I, p. 116.

The Hruzas defaulted almost immediately. R Vol. I, p. 116. Hruza filed for Chapter 7 bankruptcy protection on or about July 22, 2008. R Vol I, p. 116. Plaintiff, the fidelity bond insurer for Idahy, paid Idahy after Hruza's default. R Vol I, p. 116.

D. STANDARD OF REVIEW

In reviewing a grant of summary judgment, the Supreme Court applies the same standard of review that the District Court did. *See Mortensen v. Stewart Title Guar. Co.,* 149 Idaho 437, 441, 235 P.3d 387, 391 (2010). The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a

matter of law. *Eliopulos* v. *Knox,* 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct App. 1992). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge* v. *Clark Equip. Co.,* 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). There must be evidence upon which a jury could rely, see *Johnson* v. *Gorton,* 94 Idaho 595,495 P.2d 1 (1972), and evidence that gives rise to only the slightest doubt as to the facts does not preclude summary judgment. *Tri-State Nat* 7 *Bank* v. *Western Gateway Storage Co.,* 92 Idaho 543,447 P.2d 409 (1968).

Moreover, it is well established that a party against whom a motion for summary judgment is sought "may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." *Olsen* v. *J. A. Freeman Co.,* 117 Idaho 706,791 P.2d 1285 (1990); *Clarke* v. *Prenger,* 114 Idaho 766, 760 P.2d 1182 (1988);*Doe* v. *Durtschi,* 110 Idaho 466, 716 P.2d 1238 (1986).

II.

RESPONDENTS' RESTATEMENT OF THE ISSUES THAT HAVE BEEN PRESENTED ON APPEAL BY THE PLAINTIFF

1. The District Court did not err in ruling that the Massey Defendants, who never communicated with Idahy, and which does not know how it obtained the Appraisal, did not owe a legal duty to Idahy.
2. The Plaintiff was bound to its open court stipulation into the record of the Menchaca Affidavit. Alternatively, the Plaintiff invited error by stipulating to the admission of Menchaca Affidavit when it knew or should have known it lacked a copy of the document.

3. The District Court did not rely upon disputed material facts or draw impermissible inferences therefrom when it ruled that the Massey Defendants did not owe the Plaintiff a legal duty upon which to base its professional negligence claim.

4. The Massey Defendants respectfully request that the Supreme Court award them attorneys' fees pursuant to Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(e)(1).

III.

ARGUMENT

This is a professional negligence case. What makes this professional negligence litigation unique are the following undisputed facts:

- Idahy was not the Intended User of Massey's appraisal. R Vol. I, p. 110-112; Affidavit of Joe Huffman.[3]
- Idahy was not a Client of Massey. R. Vol. I, p. 110-112; Affidavit of Joe Huffman.
- There was no appraiser/client relationship between Massey and Idahy. R Vol. I, p. 110-112; Affidavit of Joe Huffman.
- Massey has never spoken with anybody at Idahy and did not know Idahy had received a copy of the appraisal until after the borrowers, the Hruzas, already had defaulted. R Vol. I, p. 110-112; Affidavit of Joe Huffman.
- Idahy does not know how it obtained Massey's Appraisal. R Vol. I, p. 62-63; Affidavit of Joe Huffman.

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3 The District Court Clerk inadvertently omitted the Affidavit of Joe Huffman from the Record on Appeal. The Massey Defendants have filed a Motion to Augment the Record to include the Affidavit which has been granted by this Court.

- As between Massey and his Client/Intended User, Clearwater Mortgage, Inc., the Appraisal was an incomplete or inchoate work product that was not be relied upon. R Vol. I, p. 110-111; R Vol. II, p. 192-193.
- The Appraisal was not assigned to Idahy.

Based on these undisputed facts, the District Court correctly ruled that the Plaintiff's case lacked merit as a matter of law because the Massey Defendants did not owe the Plaintiff a legal duty. The Plaintiff's theory reduces to the absurd proposition that an appraiser owes a tort duty to an undefined and potentially limitless class of third-party non-clients simply because they improperly obtained relied on a report that was intended for another, and which was undeniably rescinded by the parties who contemplated it.

A. The District Court Correctly Ruled that Massey Did Not Owe Idahy a Duty Upon Which to Predicate its Professional Negligence Claim.

The elements for a negligence cause of action are: (1) duty, (2) breach, (3) causation, and (4) damages. *See Black Canyon Raquetball Club, Inc., v. Idaho First Nat'l Bank*, 199 Idaho 171, 175-76, 804 P.2d 900, 904-06 (1991). The fundamental threshold element in a negligence action is the existence of a duty owed to another. *See, e.g., Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 39, 539 P.2d 584, 589 (1975)(emphasis added). It is well settled law that in Idaho "statutes and administrative regulations may define the applicable standard of care owed, and that violations of such statutes and regulations may constitute negligence per se. "*Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986). To form the basis for a negligence per se theory, the statute or regulation must: "(1) clearly define the required standard of conduct; (2)

the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury." *Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986); *see also Stott By and Through Dougall v. Finney*, 130 Idaho 894, 950 P.2d 709 (1997).

Applying these principls to the undisputed facts compel only one reasonable conclusion: the Massey Defendants did not owe, assume or undertake any duty to Idahy whether arising out of common law principles or based on the Uniform Standards of Professional Appraisal Practice (hereinafter "USPAP").[4] To find a professional duty in these circumstances, where there was no professional relationship, privity or communication would be unprecedented, unwarranted and countervailing to all tort principles of law.

1. The Plaintiff is Not a Member of the Class of Persons that USPAP Was Designed to Protect.

The Plaintiff contends on appeal that the District Court erred because it allegedly failed to consider USPAP and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). This argument misses the mark. The Plaintiff fails to inform the Supreme Court that in their opposition papers to Plaintiff's Motion for Summary Judgment, the Massey Defendants submitted the Affidavit of Joe Huffman. Mr. Huffman's affidavit is the only expert evidence in the record demonstrating that Idahy was not a "Client" of Massey or an "Intended User" of the Appraisal report as defined by USPAP, and that any reliance on the Appraisal report by Idahy was improper.

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4 Idaho adopted USPAP. See I.D.A.P.A. § 24.18.01.004.

Indeed, application of the undisputed facts to the relevant provisions of USPAP proves that Massey did not owe a duty to Idahy to conform with the standards of practice prescribed therein. The linchpin to this argument is simple: as defined by USPAP, Idahy was neither a Client of Massey nor an Intended User of the inchoate appraisal. Furthermore, there was no appraisal "report" that was "transmitted" to Idahy. The District Court did not error in so concluding.

USPAP defines a "Client" to be the party or parties who engage the appraiser (by employment or contract) in a specific assignment. *See* Affidavit of Joe Huffman, at ¶ 5(b). The Client is the party with whom the appraiser has an "appraiser-client relationship . . . ."*See id.* In this case, Idahy was not Massey's Client under USPAP, and, significantly, Massey and Idahy never communicated with each other about the Appraisal or anything else. R Vol. I, p. 110-112 Affidavit of Joe Huffman, at ¶¶ 7, 8. Massey did not even know Idahy had obtained a copy of the inchoate Appraisal until he was served the Complaint. R Vol. I, p. 110-112. As to Massey, Idahy could have been anybody (and everybody) in the world. Massey did not owe Idahy a duty of care as contemplated by USPAP, as Idahy is no more "a member of the class of persons the statute or regulation was designed to protect" as any other person who somehow gets a hold of an appraiser's cast-off work product drafts without authorization. *Sanchez v. Galey*, 112 Idaho at 617, 733 P.2d at 1242. The District Court correctly appreciated these facts and principles, and, as a result, correctly held that Massey did not owe or assume any duty towards Idahy.

This is further supported by the fact Idahy was not an Intended User of the inchoate appraisal. An "Intended User" is the client and any other party as identified, by name or type, as users of the appraisal . . . *on the basis of communication* with the client at the time of the

assignment."[5] *See* Affidavit of Joe Huffman, at ¶ 5(c) (emphasis added). Idahy was not the Client, as explained above, and was not identified in any manner as a user of the inchoate appraiser "on the basis of communication with client [Clearwater] at the time of the assignment." R Vol. I, p. 110-112 & Affidavit of Joe Huffman, at ¶ 8. Furthermore, the inchoate appraisal was not assigned or otherwise transferred to Idahy. R Vol. II, p. 192-193. Incredibly, Idahy does not even know how it obtained a copy of the inchoate appraisal, yet still insists it is entitled to damages from Massey. R Vol. I, p. 62-63.

Nor does the fact Idahy sent Massey a check after escrow closed on the Hruza loan alter the analysis. USPAP defines "Assignment" to be a "a valuation service provided as a consequence of an agreement between an appraiser and a client." *See* Affidavit of Joe Huffman, at ¶ 5(a). Under USPAP, the check or any payment is irrelevant, and did not retroactively create an appraiser/client relationship or duty as between Idahy and Massey. First, Idahy sent the check after it decided to loan the Hruzas the money[6]. R Vol. II, p. 174-176. Second, Massey only learned about the check after the fact. R Vol. II, p. 172. And third, USPAP clearly provides that it is the engagement, not payment, which gives rise to the client-appraiser relationship.[7] *See* Affidavit of Joe Huffman, at ¶10. As discussed above, there was no communication between Idahy and Massey, let alone "Assignment." As such, there is no relationship from which a

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[5] USPAP defines "Assignment" to be a "a valuation service provided as a consequence of an agreement between an appraiser and a client. *See* Affidavit of Joe Huffman, at ¶ 5(a).

[6] The check is dated 5 days after the settlement Statement.

[7] Notably, USPAP's position on how payment is irrelevant to the creation of an appraiser-client relationship is analogous to Massey's contention that there is no contract with Idahy because, among other reasons, there was no bargained for consideration.

breach could occur.

Moreover, there was not an appraisal "Report," as that term is defined by USPAP, upon which to base the Plaintiff's causes of action. The fact that Idahy improperly obtained a copy of the appraisal does not mean it was entitled to rely on it anymore than a person who pulls a lawyer's draft opinion letter opining on the legality of a tax strategy from the garbage receptacle.

USPAP defines "Report" to mean "any communication, written or oral, of an appraisal, appraisal review, or appraisal consulting service that is transmitted to the client upon completion of an assignment." *See* Affidavit of Joe Huffman, at ¶ 5(e). First, as analyzed above, there was no "Assignment" as between Idahy and Massey, as they never communicated with one another about anything, let alone forged an agreement. Therefore, there was no appraisal/client relationship upon which to predicate a claim based on a breach of standards of practice. Second, there was no "completion" of the "Assignment" between Clearwater Mortgage, Inc. because it and Massey mutually rescinded it. *See, e.g., Pitner v. Federal Crop Ins. Corp.*, 94 Idaho 496, 491 P.2d 1268 (1971)(A contract may be rescinded by mutual consent of the contracting parties). Third, Idahy was not a "Client." And fourth, the only evidence on point, the Affidavit of Ernie Menchaca, establishes that the Client, Clearwater, did not "transmit" or assign the appraisal draft. R Vol. II, p. 192-193. The Plaintiff cannot fail to controvert this evidence and expect to survive a motion for summary judgment. *See Olsen* v. *J. A. Freeman Co.,* 117 Idaho 706,791 P.2d 1285 (1990) (stating that a party against whom a motion for summary judgment is sought "may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the contradict the assertions of the moving party").

2. The Plaintiff Did Not Request the Court to Apply the Balance of Harms Test, But Even if it Had, the Test Demonstrates that the Massey Defendants Did Not Owe the Plaintiff a Legal Duty.

On appeal the Plaintiff asserts for the first time that the District Court should have applied the balance of harms test to determine if the Massey Defendants owed the Plaintiff a tort duty. Because the Plaintiff did not raise this issue at the District Court, it is waived.

"Substantive issues will not be considered the first time on appeal." *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007). A party cannot "remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal." *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). Failing to object to actions the District Court takes bars the party from challenging the District Court's action on appeal. *See Mackowiak v. Harris*, 146 Idaho 864, 866, 204 P.3d 504, 506 (2009).

The Massey Defendants, but not the Plaintiff, urged the District Court to apply the balance of harms test. None of the Plaintiff's briefing appears to request the District Court to apply the balance of harms test or refute the Massey Defendants' discussion of the test. In fact, the Plaintiff's briefing largely, if not entirely, ignores the key issue in this case, which is whether the Massey Defendants owed a tort duty to a lender with whom Massey had never communicated and which lender does not even know how it obtained the inchoate appraisal report. Therefore, the Plaintiff waived the issue of whether the District Court erred in not applying the balance of harms test. *See Crowley v. Critchfield*, 145 Idaho at 512, 181 P.3d at 438.

Even if the Plaintiff had not waived the balance of harms issue, the Massey Defendants owed the Plaintiff no duty under that test. In analyzing whether "to recognize a new duty or extend a duty beyond the scope previously imposed," the Supreme Court engages in a balance-of-the-harms test.

Vincent v. *Safeco Ins. Co. of Am.,* 136 Idaho 107,29 P.3d 943 (2001). The balance of harms test involves the consideration of:

> policy and the weighing of factors, which include: the foreseeability of the harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved. *Id.*

Applying these factors, the Massey Defendants did not owe Idahy, Plaintiff's subrogor, a duty of care. First, at the time Massey was preparing the appraisal, there was no foreseeability of harm to Idahy because Clearwater Mortgage, Inc. was Massey's client. R Vol. I, p. 110-112. It is undisputed that the appraisal did not identify Idahyas the "Intended User." R Vol. I, p. 110-112 & Affidavit of Joe Huffman, at ¶ 8. It is also undeniable that Massey never contemplated Idahy to be his client.R Vol. I, p. 110-112. Similarly, it is undisputed that Massey did not know that Idahy had received a copy of the appraisal, or as alleged by Plaintiff, that Idahy relied on it in making the loan to Hruza, until well after the September 13, 2007 close of escrow. R Vol. I, p. 110-112. Nor was there an assignment of the appraisal. R Vol. II, p. 192-193. Simply put, the Massey Defendants could not have foreseen any harm to Idahy because at the time of preparing the appraisal, Idahy was not within the contemplation of the Massey Defendants. *See id.*

Nor can a cogent argument be made that the Massey Defendants should have foreseen any harm to anybody. Based on his conversation with Mr. Menchaca, who was at all relevant times the president and CEO of Clearwater Mortgage, Massey understood the Appraisal to be inchoate and never to be completed, revised or finalized. R Vol. I, p. 110-11. Because Massey never contemplated that the inchoate Appraisal would be used or relied upon by anyone, it follows that it was not foreseeable that *anyone* would be

harmed by it.

Other factors of the balance of harms test also demonstrate that the Massey Defendants did not owe any duty to Idahy. Because the appraisal was nothing more than an incomplete and preliminary draft, it follows, *a fortiori,* that the Massey Defendants could not have had any inkling, let alone a "degree of certainty," that Idahy or any other lender would suffer injury by way of the appraisal. Moreover, if Idahy had followed industry custom, it would have sought an assignment, at which point it would have learned there was no appraisal report to assign. R Vol. II, p. 192-193; Affidavit of Joe Huffman at ¶12.

For the same reasons, no moral blame can be attached to the Massey Defendants' conduct. The appraisal was nothing more than an incomplete draft that was not to be used or relied upon. R Vol. I, p. 110-112; R Vol. II, p. 192-193. While moral blame might exist if an appraiser intentionally put a defective appraisal into the stream of commerce intending that third-parties rely on it, there can be no moral blame for deciding, along with one's Client, not to complete the Appraisal.

In sum, the Plaintiff waived any argument that the District Court erred in purportedly failing to apply the balance of harms test. But even if Plaintiff had not waived this issue, the Massey Defendants did not owe Idahy a duty of care under the balance of harms test.

This conclusion accords with authority in other jurisdictions holding that, absent privity of contract, an appraiser cannot be liable for negligently preparing an appraisal relied on by a third-party who is not within a definable, fixed or contemplated assignment to the recipient. *See, e.g., Webb* v. *Leclair,* 933 A.2d 177, 183 (Vt. 2007)(holding that appraiser did not owe duty to purchaser under negligence and negligent misrepresentation theory because no privity existed); *Decatur Ventures, LLC* v. *Daniel,* 485 F.3d

387, 390 (7th Cir. 2007)(under Indiana law real estate appraiser does not owe duty of care to buyer who the appraiser did not know, was not his client and was not a third-party beneficiary of contract between appraiser and client); *Christiansen v. Roddy*, 186 Cal.App.3d 780 (1986)(holding that appraiser did not owe duty of care to investors for whom the appraisal was not performed and where there was no evidence appraiser knew or aware of the investors).

B. The Plaintiff Was Bound to Its Open Court Stipulation Into the Record of the Menchaca Affidavit. Alternatively, the Plaintiff Invited Error by Stipulating to the Admission of Menchaca Affidavit When it Knew or Should Have Known it Lacked a Copy of the Document.

The Plaintiff incorrectly and misleadingly contends that the District Court relied on evidence not in the record, namely the Affidavit of Ernie Menchaca. The reality is that Plaintiff is bound to its attorney's open court stipulation to the admissibility of the Affidavit of Ernie Menchaca. Alternatively, the Plaintiff's attorneys invited error by so stipulating and, as such, is barred from arguing that the District Court erred in relying on the Affidavit of Ernie Menchaca.

Contrary to Plaintiff's argument on appeal, Mr. Menchaca's affidavit was in the record. After the District Court advised counsel that she did not have a copy of it, which the Massey Defendants cited to fourteen (14) times in their Memorandum in Support of Motion for Summary Judgment, the Plaintiff's counsel stipulated to its admission at the February 9, 2013, hearing. When the District Court asked whether Mr. Wilson had received it, he replied that he "believed so" and invited counsel for the Massey Defendants to "augment the record." *See* Tr. February 9, 2012, hearing, at 5-6. A stipulation such as this, which was made in an open court, is final. *See Workman Family Partnership* v. *City of Twin Falls,* 104 Idaho 32, 35, 655 P.2d 926, 929 (1982). The affidavit was in the District Court records within hours of the hearing. And the only reason a copy was

not served on the Plaintiff's attorneys was because of Mr. Wilson's representation that he believed he had a copy of it.

Moreover, the Plaintiff's innuendo laced argument that it was denied access to the Menchaca affidavit is, again, misleading and disingenuous. Admittedly, it is likely the Affidavit of Ernie Menchaca was not served in accordance with Idaho Rules of Civil Procedure 7(b)(1) with the Massey Defendant's Motion for Summary Judgment. But counsel for the Massey Defendants did not know this until the February 9, 2012, hearing. Despite it being referenced over a dozen times in the Massey Defendants' supporting memorandum, which undoubtedly led the District Court to search for it,[8] and should have alerted both of Plaintiff's attorneys that they lacked all the papers, neither of the Plaintiff's two law firms ever advised Massey's attorney of the issue. Tr., May 10, 2012 hearing, p. 30-31, ll. 20-3. More importantly, after the February 9, 2012, hearing, neither Mr. Wilson nor Mr. Coldwell contacted Massey's counsel to advise that they in fact did not have the Menchaca Affidavit. As such, a copy was not served on either attorney after the hearing because Mr. Wilson previously had indicated that he had a copy. With these facts, the Supreme Court should hold the Plaintiff's attorneys to their stipulation.

Furthermore, the Plaintiff's attorneys invited error by stipulating to the admission of the Affidavit of Ernie Menchaca, and, as such, cannot be heard to complain about it on appeal. "It has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible." *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010), *quoting State v. Owsley*, 105 Idaho

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8 Notably, the District Court found no merit in the Plaintiff's counsel's contention that it was denied access to the Affidavit, noting "[t]here is no indication whatsoever that it was withheld." Tr. May 10, 2012 hearing, p. 26-27, ll. 25-6.

836, 838, 673 P.2d 436, 438 (1983).

Here, the Plaintiff's attorney invited error by encouraging and inviting the District Court to admit into evidence the Affidavit of Ernie Menchaca. Notably, the Plaintiff is not seeking relief under the so-called attorney incompetence exception to the invited error doctrine recognized in some jurisdictions. *See, e.g., People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002). Nor is the Plaintiff seeking relief from its stipulation. Instead, the Plaintiff is accusing the District Court of relying on evidence that they contend was not in the record, which is manifestly false. For the foregoing reasons the Plaintiff is bound to its attorney's stipulation to the admissibility of the Affidavit of Ernie Menchaca.

C. The District Court Did not Rely upon Disputed Material Facts or Draw Impermissible Inferences Therefrom When It Ruled that the Massey Defendants Did Not Owe the Plaintiff a Legal Duty Upon Which to Base its Professional Negligence Claim.

The Plaintiff asserts on appeal that the District Court relied on "impermissible findings of fact" and made "improper inferences" in ruling that the Massey Defendants did not owe the Plaintiff a tort duty. Specifically, the Plaintiff contends that the District Court (1) did not consider Massey's acceptance of payment from Idahy; and (2) improperly relied on testimony by Icon President Connie Miller in which she informed defense counsel at the 30(b)(6) deposition of the Plaintiff that the Plaintiff did not know how it obtained a copy of the Massey's inchoate and incomplete appraisal.

The Plaintiff is wrong. First, as demonstrated below, the District Court was aware that Massey's bookkeeper cashed a check from Idahy after the close of escrow on the Hruza loan. But the check was legally and factually irrelevant because it was not consideration for any professional services, did not indicate what it was for, or identify the property name. Second,

Connie Miller's deposition was a 30(b)(6) deposition of the Plaintiff. She knew her testimony was and is binding on the Plaintiff. Any argument to the contrary is frivolous.

1. Massey's "Acceptance" of Payment is Legally and Factually Irrelevant.

The Plaintiff's argument that the District Court erred in finding that the Massey Defendants did not owe a legal duty to the Plaintiff despite the Massey Defendants having accepted an $800.00 check from Idahy is unavailing. First, as discussed in more detail above, USPAP defines "Assignment" to be a "a valuation service provided as a consequence of an agreement between an appraiser and a client." *See* Affidavit of Joe Huffman, at ¶ 5(a). Under USPAP, the check or any payment is irrelevant, and did not create an appraiser/client relationship or duty as between Idahy and Massey. Second, Idahy sent the check after it already had decided to loan the Hruzas the money.[9] R Vol. II, p. 174-175. Third, Massey only learned about the check after the fact and did not personally cash it. R Vol. II, p. 172. Fourth, the check lacks any information identifying the property to which it pertains. R Vol. II, p. 174. Thus, it provides no reason for anyone to think that Idahy relied on an appraisal that had been rescinded earlier by Massey and Clearwater Mortgage. As such, the District Court correctly perceived that the $800.00 check to be the red herring that it is.

2. The Testimony of the Plaintiff's 30(b)(6) Designee, Connie Miller, Is Binding.

The Plaintiff wrongly suggests that the District Court made impermissible findings of fact and/or inferences on the issue of how Idahy obtained the appraisal by contending that its own

[9] The check is dated 5 days after the settlement Statement. The proverbial cat was already out of the bag.

30(b)(6) designee, Connie Miller, was not really testifying on behalf of the Plaintiff. The argument is unavailing because Ms. Miller's testimony is binding on the Plaintiff.

In depositions noticed pursuant to 30(b)(6), "the deponent's testimony is the corporation's testimony, and if the corporation is a party, the testimony may be used at trial by an adverse party for any purpose." *See Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 524, 525-26 (C.D. Cal. 2008); *see also Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009) ("[I]t is settled law that a party need not produce the organizational representative with the greatest knowledge about a subject; instead, it need only produce a person with knowledge whose testimony will be binding on the party.").

Here, the Massey Defendants noticed the 30(b)(6) deposition of the Plaintiff. R Vol. I, p. 1. The Plaintiff, in turn, designated Connie Miller to testify, including regarding how Idahy obtained a copy of the appraisal. Ms. Miller understood that her testimony was binding on the company, and that she was not answering questions on her own behalf. R Vol. I, at p. 58. Ms. Miller also unequivocally testified that the company did not know how it obtained a copy of the appraisal. R Vol. I, at 62-63. The Plaintiff's attempt to avoid the clear law and unequivocal facts lacks merit and is frivolous.

Moreover, the Plaintiff's argument that the District Court's ruling should be reversed because a question of material fact exists as to how Idahy obtained the appraisal also is unavailing. It is well established that a party against whom a motion for summary judgment is sought "may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." *Olsen* v. *J. A. Freeman Co.,* 117 Idaho 706,791 P.2d 1285 (1990).

In this instance, the Massey Defendants came forward with the following evidence relevant to how Idahy obtained the appraisal:

- Idahy was not the Intended User of Massey's appraisal nor his Client under USPAP. R Vol. I, at 110-112; Affidavit of Joe Huffman, at ¶ 8.
- There was no appraiser/client relationship between Massey and Idahy. R Vol. I, at 110-112; Affidavit of Joe Huffman, at ¶ 9, 10.
- Massey has never spoken with anybody at Idahy and did not know Idahy had received a copy of the appraisal until after the borrowers, the Hruzas, already had defaulted. R Vol. I, at 110-112.
- Idahy does know how it obtained Massey's appraisal. R Vol. I, at 62-63.
- Idahy did not obtain an assignment or transfer of the appraisal. R Vol. I, at 192-193; Affidavit of Joe Huffman, at ¶ 9.
- It would have been improper for Idahy to rely on an appraisal supplied by the borrowers. *See* Affidavit of Joe Huffman, at ¶ 14.

Based on these facts, the District Court was on solid ground when it ruled that the Massey Defendants did not owe a tort duty to Idahy. Faced with this evidence, the Plaintiff was charged with adducing proof that somehow supported their theory of the case, which is notwithstanding the facts set forth throughout this brief, that the Massey Defendants breached a legal duty owed to the Plaintiff's subrogor. *See Olsen* v. *J. A. Freeman Co.,* 117 Idaho 706, 791 P.2d 1285. But instead of demonstrating why it would be proper to rely on an appraisal potentially provided to it by the borrowers, or showing why you would not need to procure an assignment of the appraisal as testified by Mr. Menchaca, the Plaintiff argues that the District Court usurped the fact-finder's role.

The assertion simply lacks merit. The issue at the heart of the opposing motions for summary judgment was whether the Massey Defendants owed a legal duty. Implicitly contending that they did by arguing that the District Court usurped the fact-finder's role by seizing on a purported metaphysical uncertainty as to how Idahy obtained the appraisal and by stating the obvious –that the appraisal was generated by Massey *for* Clearwater Mortgage-- misses the issue. Of course, the appraisal came from Clearwater Mortgage in some sense, who after all, ordered it and then rescinded it. But as Massey's and Menchaca's testimony establishes, it was not supposed to be released to, nor relied upon, by anybody, as there was no assignment. Furthermore, as Mr. Huffman testified, it would have been improper for Idahy to rely on an appraisal provided by the borrowers. Yet despite these facts, which the Massey Defendants adduced and provided to the District Court, the Plaintiff did nothing to establish why it should be owed a legal duty under facts that are logically consistent with the possibility that someone at Idahy improperly obtained the appraisal from the borrowers or retrieved it from the "garbage."

D. Because the Plaintiff's Appeal is Frivolous, the Supreme Court Should Award the Massey Defendants Attorneys' Fees Under Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(e)(1).

Attorneys' fees may be awarded under Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(e)(1) in cases where the Supreme Court finds the "case was brought, pursued or defended frivolously, unreasonably or without foundation . . . ." *See Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 699, 273 P.3d 1284, 1292 (2012). In an appeal, the Supreme Court will consider the "entire course of litigation" to determine if "any legitimate issues were presented." *See id.*, 273 P.3d at 1292. The Supreme Court will deny attorneys' fees under these provisions if at "least one legitimate issue was raised." *See id*, 273 P.3d at 1292.

Here, the Plaintiff did not raise one "legitimate issue," and, therefore, the Supreme Court

should award the Massey Defendants attorneys' fees pursuant to Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(e)(1). The Plaintiff's first issue, which is that the District Court misconstrued Idaho and federal law regarding whether Massey owed the Plaintiff a duty, was pursued frivolously and without foundation. First, at the District Court level the Plaintiff waived any discussion about the balance of harms test. Second, the Plaintiff failed to submit evidence (and indeed did not even meaningfully argue the issue at the District Court) supporting the existence of a legal duty owed. The Massey Defendants, by contrast, submitted the Affidavit of Joe Huffman, which supported their position that they did not owe the Plaintiff or its subrogor any tort duty under USPAP. Likewise, the Massey Defendants extensively briefed and argued the balance of harms test.

The Plaintiff's second issue, which is that the District Court relied on evidence not in the record, specifically the Affidavit of Ernie Menchaca, also is frivolous. It is factually and demonstrably false because the Plaintiff's attorney stipulated in open court to the affidavit's admission into the record. Moreover, the Plaintiff invited error by so stipulating when, as the District Court implied, it should have known it lacked the affidavit and "inquir[ed]" when they learned as much. Tr., May 10, 2012 hearing, at 30-31, ll. 20-3.

Moreover, the Plaintiff's third issue, which is that the District Court relied on disputed material facts, faces a similar fate. The argument that Ms. Connie Miller was speaking on her own behalf and not Cumis's flies in the face of the facts and unequivocal law regarding 30(b)(6) depositions. Furthermore, the balance of Plaintiff's discussion on this issue lacks foundation, as discussed above, misconstrues and/or misapplies the standards governing motions for summary judgment, and frivolously tries to raise an issue of material fact when there is not one.

IV.
CONCLUSION

For the foregoing reasons, the Supreme Court should affirm the District Court's grant of summary judgment in favor of the Massey Defendants. The Plaintiff has failed to demonstrate why the District Court's ruling should be reversed and is owed a legal duty by the Massey Defendants. The Massey Defendants respectfully request that the Supreme Court award them attorneys' fees under Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(e)(1).

Respectfully Submitted this 4 day of March, 2013.

Michael E. Kelly
Attorney for the Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of March, 2013, I served a true and correct copy of the attached *Massey Respondents' Brief* by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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